IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 273

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO

No. 324

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE

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American Trucking Associations, Inc., submits this brief *amicus curiae* to the Court in the genuine belief that it will aid the Court in the resolution of some of the issues presented. The parties consented to the filing of this brief in accordance with Rule 42(2).

STATEMENT OF THE CASE

These cases are before the Court on writs of certiorari to the Court of Appeals for the District of Columbia Circuit. The decision to which these writs were directed arose out of a review of an order of the National Labor Relations Board (referred to herein as "the Board") sustaining a complaint alleging that Petitioner in Case No. 324 (referred to herein as "the Machinists") and Respondent in Case No. 273 (referred to herein as "the Teamsters") had violated Section 8(b)(4)(A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*) (referred to herein as "the Act"). This subsection so far as relevant reads as follows:

> "Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *"

The asserted violations of the Act occurred during an economic strike between the Machinists Local and American Iron and Machine Works, a manufacturing company in Oklahoma City, Oklahoma. The Machinists picketed the plant and the company thereupon

delivered freight in its own trucks to the loading platforms of the trucking carriers in Oklahoma City. The Machinists appealed to the employees on the platforms not to load the trucks of their employers with American Iron freight. The carriers (with the exception of Lee Way Motor Freight Lines) told their employees to do so, however, although each of the carriers was a party to a multiple-employer contract with the Teamsters, known as the "Oklahoma City Cartage Agreement" which contained the following clause (R. 187):

> "Members of the Union shall not be allowed to handle or haul freight to or from an unfair company provided this is not a violation of the Labor Management Relations Act of 1947."

All the trucking companies involved were common carriers for hire engaged in the business of hauling freight by motor vehicle under license from the Interstate Commerce Commission and had customarily carried freight for American Iron (R. 4). The Teamsters then instructed the carrier employees who were covered by the area contract to refuse to receive, check or otherwise handle American Iron freight, according to the allegations of the complaint (R. 5-7, inc.). The Teamsters admitted these allegations (R. 9, 10) but pleaded as an affirmative defense that the instructions given the employees had been for the purpose of "complying with the contract."

The Trial Examiner, relying upon the Board decision in *McAllister Transfer*, 110 NLRB 1769, held that both unions had violated Section 8(b)(4)(A) with respect to their activity concerning the employees of all the carriers except Lee Way, the company which had not ordered its dock employees to handle the

picketed American Iron shipments. The Board not only sustained these findings against the unions, but also found illegal their conduct with regard to the employees of Lee Way. According to the majority opinion, all the elements of a violation of Section 8(b)(4)(A) were present when the unions directly appealed to the carrier employees to engage in a concerted refusal to handle American Iron products. Citing their recent decision in the *Sand Door*[1] case, the Board said unions were prohibited from instigating employees of a secondary employer to cease handling the goods of any employer, irrespective of any hot cargo contract and such instigation was not excused by subsequent failure of any secondary employer to countermand the unions' instructions because proof of direct union inducement of his employees was sufficient. Member Rodgers, whose vote was necessary to the majority, concurred, but on the broader ground that the hot cargo contract was contrary to public policy. Members Murdock and Peterson dissented on the ground that the conduct of the unions was lawful under the hot cargo clause.

In the Court of Appeals each of the three judges assigned to the case wrote a different opinion. Judge Bastian, writing the principal opinion, declared that because of the hot cargo contract, there was no violation of the Act on the part of the Teamsters. In his view the instructions against the handling of American Iron freight was simply an exercise by that union of a valid contractual right conferred upon it by its contract with the carriers.

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[1] *Sand Door & Plywood Co.*, 113 NLRB 1210, 17 aff'd sub. nom. *N. L. R. B. v. Local 1976, United Brotherhood of Carpenters, etc.*, 241 F. (2) 147 (CA 9). This decision is also before this court for review.

The Machinists who had also relied upon the hot cargo contract as a defense, fared differently, however, Judge Bastian taking the position that since that union was not in privity of contract with the carriers, its conduct was not excused by the contract between those employers and the Teamsters.

Judge Washington concurred with his view respecting the Teamsters and accordingly the Board order against that union was set aside. Judge Washington disagreed, however, with the disposition his colleague proposed to make of the order against the Machinists, pointing out that since Judge Bastian was relying in the Teamsters case upon the theory that what was being induced was not a "strike or refusal to work" with an object of "forcing or requiring" because the employers had agreed to go along with the boycott action, his ruling should also apply to the Machinists conduct. As Judge Prettyman, agreeing with the Board, objected to setting aside the order against either union, the distinction between the two unions made by Judge Bastian became the majority view.

As it is our position that the hot cargo clause was not a defense to the conduct of either the Teamsters or the Machinists, we will not advert further in this brief to Judge Bastian's distinction, but shall argue that the court below erred in setting aside any portion of the Board order.

THE INTEREST OF THE AMICUS CURIAE

The amicus, a corporation with offices in Washington, D. C., is a federation of affiliated associations of trucking employers operating in every state in the union. The great bulk of the trucking industry is unionized. Most trucking employers bargain with various subordinate bodies of the International Brother-

hood of Teamsters through some 75 employer associations which negotiate contracts on a local or regional basis.

The increasing dependency of the economy of the entire nation upon the trucking industry is apparent. Twenty-five thousand communities depend entirely upon trucks for the movement of their overland freight and seventy-five percent of all freight in the United States moves at one time or another by motor truck. The industry is a conglomeration of small businesses. According to the research department of the Association, the 20,000 motor carriers which are required to report to the Interstate Commerce Commission have an average of only 22 employees and only 3000 of these carriers have annual revenues exceeding $200,000. In addition to the companies reporting to the Interstate Commerce Commission there are also thousands of smaller unregulated carriers.

Paralleling the high degree of unionization in the trucking industry [2] has been the widespread incidence of hot cargo clauses in union agreements—provisions which in one form or another existed long before the Taft-Hartley Act. Under threats of strike many of the most important trucking employer associations have had to agree to the inclusion of these provisions in their contracts. A number of typical examples are cited in the appendix to this brief.

The industry has not been a willing party to these contracts and has taken the position in Congressional hearings that secondary boycotts should be effectively curbed. In 1953 Benjamin R. Miller, industrial rela-

[2] The United States Labor Department reports that 90% of the employees of common and contract carriers have been organized by the Teamsters.

tions director of the association, testified before the Senate Committee on Labor and Public Welfare that "decisions of the National Labor Relations Board circumventing the obvious intent of Congress have virtually made a farce of the secondary boycott interdictions of the National Labor Relations Act of 1947".[3] He stated the Association's position as follows:

> "Our industry is anxious that secondary boycotts implemented directly against truck operators be effectively restrained. But more vitally are we concerned with the use of the industry as the vehicle by which the secondary boycott is effectuated against other employers, unions, and employees other than our own. Witnesses who have appeared before your committee in the past, and those currently before the House Labor Committee, have stated that unions, with the reluctant aid of motor truck operators: Have forced employees of other companies into unions unwillingly; have forced other workers to change unions; and have brought other companies to their knees during work stoppages. To such allegations we cannot plead innocent. We hasten to state, however, that our industry is a most unwilling tool for such purposes and that our participation in them stems from our inherent vulnerability."

IMPORTANCE OF QUESTION PRESENTED

While the issue presented to the Court in this case is primarily one of statutory construction, *viz.*, the question of whether hot cargo contracts render unions immune for conduct which would otherwise be a violation of Section 8(b)(4)(A) of the Act, the answer to

[3] Hearings on Proposed Revisions of Labor-Management Relations Act, 83d Cong., 1st Sess., p. 743. At that time the Board was refusing to grant relief against boycotts if unions raised the defense of "hot cargo" or "struck work" contracts. *See Conway's Express*, 87 NLRB 972; *Pittsburgh Plate Glass*, 105 NLRB 740.

it will have major repercussions upon our national labor policy.

The basic principle of the Act—to which all of the specific provisions are merely ancillary—is the guarantee (embodied in Section 7) of freedom of the workers of the United States to decide for themselves whether or not to be represented by a union, and to select that union without interference.

The Act proscribes as unfair practices, conduct both by management and labor organizations, intended to coerce workers in their free choice. In short, the primary object of the Act was to free workers from the paternalism of management and unions. It was for this reason that the National Labor Relations Board was assigned the function of conducting elections by secret ballot in appropriate bargaining units, and given access to the courts to enforce the results of these elections. It is apparent that the safeguards provided by law are meaningless if powerful labor organizations, through exercising economic pressure upon employers, whose workers they do not represent, can compel them to deal with these unions in complete disregard of the wishes of the employees affected by such arrangements.

One of the worst abuses upon which revelations of the McClellan Committee have thrown the spotlight, is the continued use by labor organizations of the secondary boycott as an organizing device. Time after time it has been shown that the contracts which aggressive locals of the Teamsters have imposed upon reluctant employers and equally reluctant employees have been due to the ability of their organizers to force almost any small employer to capitulate by shutting off the delivery and pick-up of commodities. This is accomplished by directing members of the Teamster

Union to refuse to cross picket lines, or in the case of non-union trucking operators, to refuse to interline freight destined for carriage on a carrier designated as "unfair".

This practice has become so widespread that recently an examiner for the Interstate Commerce Commission refused to grant applications for certificates to a group of non-union carriers on the ground that the connecting carriers being unionized, had not and would not interchange cargo with them.[4] Obviously such practices conflict with the most fundamental policy of the Labor Relations Act—the right of employees rather than their employer—to decide whether or not they want to have a bargaining representative.

If the Teamsters may, with impunity, under hot cargo contracts continue to force their own union or some other labor organization upon employers without employee elections, their Executive Council will soon supplant the Board as the final arbiter on representation issues. This has been highlighted in informed newspaper articles dealing with the recent expulsion of the Teamsters from the AFL-CIO. On December 8, for example, *The New York Times* carried a front page story by its labor expert, A. H. Raskin, reading, in part:

> "ATLANTIC CITY, Dec. 7—The first rumblings of trouble came today in the wake of the ouster of

[4] Report of Examiner Driscoll in *Nebraska Short Line Carriers, Inc.*, I. C. C. No. MC-116067 (Sub. No. 2): "In this case the examiner found that the larger trucking companies operating out of Omaha, Nebr., were unionized and that their contracts with the Teamsters almost invariably contained hot cargo provisions. One of the unsuccessful applicants was a carrier whose employees had repudiated the Teamsters in a Labor Board election. In none of them apparently had the Teamsters union been certified as majority representative.

the International Brotherhood of Teamsters from the merged labor federation. But there were no immediate signs of any general outbreak of civil war on the labor front.

A Teamster local in Louisville threatened to end its four-month-long support of a strike headed by the chief author of the expulsion order. However, aides of James R. Hoffa, president-elect of the truck union, reported that they were trying to persuade the local to go along with the non-reprisal policy laid down by the Teamsters.

The strike involves fifty members of the United Hatters, Cap and Millinery Workers International Union employed by the Louisville Cap Company.

The union's president is Alex Rose of New York, chairman of the appeals committee at the convention here of the American Federation of Labor and Congress of Industrial Organizations.

It was the appeals committee that made the formal recommendation at yesterday's convention session to expel the 1,333,000-member truck union on charges of domination by corrupt leaders. Mr. Rose told the delegates that his own union was getting "splendid cooperation" from the Teamsters in its Louisville walk-out. He said the sole purpose of the ouster was to spur the union to rid itself of racket elements." . . .

The story does not mention the fact that this was a minority strike called by the Hatters Union for recognition, and that a petition for election was pending at that time. On December 9, the Board, over the objection of the Hatters Union, ordered a secret ballot of the employees.[5]

Two days before publication of the *New York Times* story, the *Wall Street Journal*, in an article relating

[5] *Lipschutz, et al. and United Hatters, Cap, & Millinery Workers Union*, NLRB Case No. 9-RM-159, dated December 9, 1957.

to the expulsion order, also reported on the admitted dependency of other unions upon the Teamsters in their organizing efforts:

> "Technically, expulsion means the A. F. L.-C. I. O. leadership would not countenance agreements between federations unions and the ousted Teamsters. . . .
>
> The federation's course on local Teamster-A. F. L.-C. I. O. relationships is perhaps founded more on necessity than on any magnanimity. Ouster from the federation will hardly diminish the Teamsters' vast economic powers; the truckers still will be quite capable of making or breaking strikes called by smaller, weaker unions—in or out of the A. F. L.-C. I. O.
>
> Take, for example, the Retail, Wholesale and Department Store Union, A. F. L.-C. I. O. It has about 150,000 members, about half of whom are in the New York area. To stage an effective strike, the union admits it needs help from the Teamsters who usually agree to stop deliveries to a struck store. Right now, friendly Teamsters are backing the retail union's strike against the shoe department of Bonwit Teller in New York." . . .

We earnestly submit to the Court that under the construction which Congress meant the Board to place upon Section 8(b)(4)(A), these boycotting tactics by the Teamsters Union are completely illegal, even though authorized by hot cargo contracts. We propose to show in the body of our brief that:

1. The language of the controlling subsection affords no support for the view that it does not prohibit stoppages induced by the operation of hot cargo clauses in collective bargaining contracts.

2. The legislative history of the Act demonstrates that Congress did not intend to countenance

secondary boycotts in industries where hot cargo contracts were prevalent and notorious.

3. Common carriers have no right to discriminate against any class of shippers and hence are not free to honor hot cargo contracts.

ARGUMENT

I. THE JUDICIAL HOLDING THAT SUBSECTION 8(b)(4)(A) OF THE ACT DOES NOT PROHIBIT STOPPAGES INDUCED BY UNION ENFORCEMENT OF HOT CARGO AGREEMENTS DOES VIOLENCE TO THE PLAIN WORDING OF THIS SUBSECTION

A. The Failure of Employees Because of Union Instructions to Handle and Reship Cargo Which Arrives on Loading Platform in Normal Course of Carrier's Business Certainly Amounts to a "Strike" or "Refusal" to Handle Unless Employees Were Acting Upon Specific Instructions of Their Employer With Regard to that Particular Freight

Whatever arguments may be drawn from legislative history, or considerations of public policy on the merits of hot cargo clauses, one thing at least seems crystal clear—the holding of the Board is supported by the plain wording of Section 8(b)(4)(A); the holding of the Court below is not. In the controlling opinion[1] of the Board, Chairman Leedom and Member Beaney stated that

> . . . while Section 8(b)(4)(A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle 'hot' goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely, as he did, on the fact that the secondary employers herein did not ac-

[1] This was the opinion in which Member Rodgers concurred.

quiesce in the refusal of their employees to handle American Iron's freight. In our view, it is sufficient that there was direct inducement of such employees by Teamsters not to handle such freight, with an object of forcing the secondary employers to cease dealing with American Iron.

Inasmuch as the relevant subsection of the Act makes it an unfair labor practice for a union (here, both the Machinists and the Teamsters) to ". . . induce or encourage the employees of any employer (here, the carriers) to engage in a *strike* or a *concerted refusal in the course of their employment* to . . . transport, or otherwise handle any goods, where an object thereof is forcing or requiring any employer . . . to cease doing business with any other person", (Italics supplied), it is apparent that all the elements of the conduct proscribed were present in the instant case, *i.e.*, inducement, refusal, and unlawful objective. Both the Machinists and the Teamsters encouraged employees of the carriers to refuse to load goods from American Iron on the trucks of their employers, for the obvious purpose of requiring the carriers to cease doing business with American Iron.

The Act does not provide "unless such strike or refusal was engaged in for the purpose of requiring their employer to comply with a contract he had already made excusing them from such work". Yet that is what the court below and the dissenting minority of the Board would read into the Act.

Paradoxically, however, both the court below and the Court of Appeals for the Second Circuit, which has also reversed the Board's rejection of a hot cargo clause as a defense to secondary strikes, profess to find support in the literal language of the subsection. These

courts reach this result by attributing to the Board opinion a preliminary finding or premise which is asserted to be inconsistent with the ultimate conclusion of the authors. Thus Judge Bastian, speaking for the court below, after correctly stating that the two Board members comprising the majority "held in effect that even assuming that the Act itself does not prohibit the execution of a hot cargo clause", went on to express his agreement "with the four members of the Board who held that the hot cargo clause was not violative . . . of Section 8(b)(4)(A). This seems also to have been held by the Second Circuit in the so-called *Conway* case [*Rabauin v. National Labor Relations Board*, 195 F. 2d 906, 912]".

Accordingly, he reasoned that the Board's disapproval of direct appeals by unions to employees covered by a hot cargo contract would "render nugatory the clause itself . . ."

> "Here the Teamster's conduct only consisted of urging the employees of the carriers not to handle freight from a company which they considered unfair. This was exactly what the carriers had agreed their employees would not be required to do. If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such a situation arises, it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work. Nor can it be said that there was a forcing or requiring of an employer to cease doing business with another person, because the employer was only being *compelled* to live up to its own voluntary contract entered into in advance of the happening." [Emphasis supplied.]

We submit that Judge Bastian completely misconstrued the concession of the majority, *viz.*, that Section

8(b)(4)(A) did not forbid the execution of a hot cargo clause. It is one thing to say that a statute prohibiting the commission of a certain act does not necessarily proscribe the mere execution of a contract which contemplates the commission of such act. But it is quite another thing to infer therefrom that such a contract is valid and enforceable or that its performance would be lawful. Many examples come to mind. It is not illegal, per se, for an employer to enter into a contract for a 48 hour week at straight time rates. But the actual application of the contract conditions to an employee covered by the Fair Labor Standards Act is unlawful. Similarly—in the field of unfair labor practices—we doubt that any court would hold that a manufacturer who accepts a written order from an anti-union customer conditioned upon a promise to employ only non-union workers, thereby violates Section 8(a)(3) of the Act. It is obvious, however, that if the manufacturer carried out his promise by discharging union men and discriminating against union applicants, his contract would not be a valid defense in a prosecution under this sub-section.

Thus, there is no basis for Judge Bastian's inference[7] that because the mere execution of the hot cargo contract was not unlawful, the contract conferred "rights" upon employees which the unions could lawfully induce them to exercise. The prohibition against union inducement or encouragement of certain em-

[7] The undiscriminating character of this inference is indicated by the court's reference to "four members of the Board who held that the hot cargo clause was not violative of Section 8(b)(4)(A)". Obviously this reference is not only to the two Board members who held that the enforcement of the clause by appeals to the employees was illegal, but to the two dissenting Board members, Messrs. Murdock and Peterson, who contended that the contract was valid and enforceable for all purposes.

ployee action makes no distinction between employees who have a legal right to engage in a work stoppage and those who do not.

The court should also observe the self-contradictory character of the holding that "nor can it be said that there was a *forcing* or *requiring* of an employer to cease doing business with another person, because the employer was only being *compelled* to live up to its own voluntary contract entered into in advance of the happening". (Emphasis supplied.)

The words "compel", "force" and "require" are synonymous. Therefore, if a man is compelled to do something, it is difficult to understand why it cannot be said that he is being "forced" or "required" to do it. We concede that if an employer complies with a hot cargo contract by specifically instructing his employees not to handle goods from a struck plant which are on the loading platform, the requisite element of a "strike" or "refusal" are not present when the employees, pursuant to such instructions, do not reload the goods on a connecting carrier, even though in the normal course of business, the goods would have been reshipped in accordance with the bill of lading. But if the employer declines or merely fails to give them such instructions, it would certainly be in accord with the ordinary meaning of words to describe the employees' failure to reload because they were warned by a union that the goods were "hot", as a "refusal" to handle the goods. And if the ultimate object of thus forcing the employer to live up to his contract was to force or require him and other persons [8] to cease doing

[8] The Bastian opinion also relies, in part, upon the theory that Section 8(b)(4)(A) was intended only to protect secondary employers not "involved" in "the disputes of others" from being

business with American Iron—a point on which there is no dispute—then the instigation of the strike or refusal was precisely the kind of conduct the Act forbids.

The latest opinion of the Second Circuit expressly purports to rely upon the "clear language of the Act".[9] An examination of Chief Judge Clark's majority opinion discloses that far from giving effect to the precise wording of the subsection, the court adopted the same "semantic contentions" which were successfully urged upon the Court of Appeals for the District of Columbia and are stated at some length in the opinion of the dissenting Board members in the *Sand Door* and *McAllister Transfer* cases.[10] Thus, the court holds that there can be no "forcing or requiring" of any employer when there is advance consent to honor a hot cargo clause, overlooking the fact that if the employer

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pressured into breaking off business relations with a third person. Inasmuch as it is apparent that the carriers immediately affected by refusal of their employees to handle the American Iron shipments were not involved in the strike at that company, it is not easy to follow this reasoning. The court seems to find involvement in the fact that the Teamsters designated the products of the struck company as unfair. Assuming that this was involvement, the court overlooks the fact that the prohibition of Section 8(b)(4)(A) is not limited to the impact upon the secondary employer but refers to "forcing or requiring . . . any employer *or other person* . . . to cease doing business with any other person". Thus, the failure of the carriers to ship the goods delivered to them at their terminals would also cause connecting carriers to cease handling American Iron products and would cause customers and consignees of American Iron who were unable to obtain deliveries to look to some other supplier. Hence the language of the statute does not support the narrow purpose attributed to it by the court.

[9] *Milk Drivers Union* v. *N. L. R. B.*, 245 F. 2d 216, at 217, reversing *Crowley's Milk Co.*, 116 NLRB 1408.

[10] *Sand Door & Plywood Co.*, 113 NLRB 1210 (1955), enforced in *N. L. R. B.* v. *Local 1976*, 241 F. 2d 147 (C. A. 9); *McAllister Transfer Inc.*, 110 NLRB 769 (1954).

has repented of his bargain, the subsequent work stoppage or refusal to handle is an obvious method of "forcing or requiring" him not only to abide by his contract, but to cease doing business with the shipper. The opinion states:

> "The statutory language is clear: there is no violation of § 8(b)(4) unless the union encourages the employees to *coerce* the secondary employer. Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion. Normally the secondary employer receives something at the bargaining table in exchange for granting the hot cargo clause, and he is no more coerced when the employees subsequently exercise their privilege than a landowner is coerced when those to whom he has granted licenses cross his land."

The obvious answer is that one will search Section 8(b)(4) in vain for the word "coerce" which the court has italicized. But even assuming that the court was using the word "coerce" as a synonym for "force" or "require", it does not follow that the secondary employer is free from coercion when it becomes necessary to encourage concerted action by the employees to require him to honor the hot cargo clause.

Granted that a secondary employer like the hypothetical landowner who objects to licensees crossing his property may not plead duress in a suit involving the other parties' exercise of a contractual right, this does not necessarily mean that it is necessarily legal to induce persons to exercise their rights. The offences of barratry and maintenance, for example, do not depend upon whether the litigants encouraged to sue have valid causes of action. But even conceding, arguendo, that the hot cargo contract might be enforceable as between

the parties [11] thereto, one is startled by the proposition that a tort feasor by signing a contract with a stranger may render himself immune from liability to a third party injured by his conduct.

The Second Circuit opinion then went on to condemn the majority rationale of the Board decision now before this Court, stating that

> "In this most recent statement the reaction of the secondary employer has become wholly irrelevant and there is still no explanation as to how the majority supplies the missing element of 'coercion'".

Certainly any such approach to the instant case would overlook the fact that it was the employees and not their employers who refused to accept goods for trans-shipment from the American Iron truck, and to that extent forced the trucking company to discontinue its business with the shipper. Thus we urge this court to observe the difference between a situation where an employer's own refusal to accept certain goods for delivery precludes any possibility of a refusal to handle on the part of his employees, and the situation presented by this case where the employees refused to carry out an assignment on the ground that the contract excused them from doing so. Surely, unless words are deprived of their plain meaning, the latter conduct amounts to a "strike" or "refusal", even though the employer may by his previous contract have lost his legal right to insist on the assignment.

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[11] All that the hot cargo clauses purport to do is to prevent an employer from disciplining employees who refuse to handle blacklisted goods.

B. The Words "in the course of their employment" Are Not Co-extensive With a Collective Bargaining Contract

Most of the considerations advanced by the court below for holding that the hot cargo contract was an adequate defense to the Teamsters' conduct were first suggested by a majority of the Board in a decision which that agency has now repudiated, *Rabouin d/b/a Conway's Express*, 87 NLRB 972. As we have been at pains to point out, this reasoning is a strained and implausible construction of the language of Section 8(b)(4)(A). As two members of the Board (Chairman Herzog and Reynolds) had dissented in the *Conway* case on the hot cargo issue, the Board majority when the question was presented again in *Pittsburgh Plate Glass*, 105 NLRB 740, apparently decided that its rationale required some bolstering. In that instance the majority seized upon the words "in the course of their employment" as a supporting reason for asserting the absence of the requisite "concerted refusal". The Board stated:

> "Nor was their employees' refusal to handle Pittsburgh freight 'in the course of their employment' within the meaning of Section 8(b)(4)(A) for that employment as defined by the contract excluded from the required job duties work on unfair goods".

We contend that there is no basis for placing such a construction upon the phrase "in the course of their employment" even though Judge Clark in the Second Circuit court opinion, to which we have referred, *Milk Drivers Union v. N. L. R. B.*, 245 F. 2d 216, also leans heavily upon this theory. We think it is plain that the words "in the course of their employment" were simply inserted to refer to services performed within the scope of the employer-employee relationship, in contra-

distinction to unauthorized work which an employee might perform on his own, but for which he neither expects nor is entitled to compensation.

What the Teamster argument boils down to is that any services performed by an employee, even though within the contemplation of his employer and for his benefit, are outside the course of his employment unless the employee is required to perform them by collective bargaining contract under penalty of discharge or some other disciplinary action.

We submit that this view is untenable. It would mean that the employees of the carrier in this case would not have been entitled to pay for any time spent in checking, handling, or transporting freight from American Iron because they were not required to do so by contract once their union had designated this manufacturer as "unfair".

It is not unusual for collective bargaining contracts specifically to relieve employees of certain duties that might be regarded as onerous. If they perform them, however, at their employer's request, they are doing so in the course of their employment. Hence they would be entitled to wages under the Fair Labor Standards Act,[12] and if injured, to Workmens' Compensation. Many collective bargaining agreements, for example, provide that employees shall not be "required" or "allowed" (the word used in the contract drawn into issue here) to work for more than seven hours in any one day. Nevertheless, if they do work overtime when an opportunity presents itself, it is perfectly clear that they have a right to be paid.

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[12] *Keppler* v. *Republic Pictures*, 5 W. H. 90; *Pinkley* v. *Allied Oil*, 5 W. H. 267; *Lawley & Son* v. *South*, 140 F. (2d) 439 (CA 1), cert. den. 322 U. S. 746.

The Longshoremen and Harbor Workers Compensation Act (USC Title 3, Sections 901 to 950), uses the very words in Section 8(b)(4)(A), "in the course of employment". Under this Act which was consequently extended to private employment in the District of Columbia, workers are entitled to compensation for injuries "arising out of and in the course of employment".

A Supreme Court decision on the meaning of the phrase conclusively should dispel any notion that the term "in the course of employment" embraces only work which a collective or individual contract of employment requires the employee to perform. In *Voehl* v. *Indemnity Insurance Company*, 288 U. S. 162, it was held that under this language a warehouseman injured in his own automobile on his way to the warehouse was entitled to recover. The facts of this case show that his employer contemplated that he might ride back and forth from his home to the warehouse in his own automobile for he was entitled to be reimbursed for mileage. The record, however, in no way suggests that his employer required him to adopt this mode of transportation. In another case construing the same language the Court of Appeals for the District of Columbia held that a car washer employed at a garage who was killed after hours in a company car towing the car of another employee met his death "in the course of employment" as the work he was engaged in was for the benefit of his employer, *Lumbermen's Mutual Casualty Company* v. *Hoage*, 58 F. 2d 1072.

It is true that in Section 8(b)(4) and in Section 303 these words appear in a different context than in the context of the workmen's compensation acts. This does not mean, however, that Congress intended this phrase

to have a different meaning, for the real purpose of the authors of the Act in inserting this limitation in the relevant subsections is not obscure. In the absence of such language it might have been inferred that Congress was seeking to stop unions from inducing employees not only to refuse to handle or transport goods which they would normally handle in their places of employment, but also was prohibiting unions from inducing employees in their role of *consumers* to refrain from using certain automobiles, cigarettes, household utensils, or other products made by non-union manufacturers.

In order to preclude any such inference, the House and Senate Conferees used words of art which had acquired a definite meaning in other acts to make it clear that all that unions were forbidden from doing was to desist from causing employees who would normally handle certain commodities in the course of their employment duties to refuse to do so.

II. CONGRESSIONAL INTENT TO OUTLAW SECONDARY BOYCOTTS REGARDLESS OF HOT CARGO CONTRACTS IS CLEAR AND UNMISTAKABLE

A. The Sponsors of the Act Referred Specifically to Union Boycotts in Industries Where Hot Cargo Contracts Were Notorious

In the absence of clear and unequivocal language in the Act compelling the court below to reach the result it did in the *Teamster* case (No. 273) its construction of the statute can be defended only on the ground that the interdiction of secondary boycotts by Congress was not meant to apply to unions which were parties to and operated under hot cargo and struck work contracts. There is not a shred of evidence, however, to show that Congress had any such limited purpose.

On the contrary, the legislative history makes it plain that Congress was deeply concerned with the prevalence of secondary boycotts precisely in those areas where the custom and practice in union contracts sanctioned such conduct on the part of unions, *viz.*, the construction, trucking and printing industries.

In the building industry the attempts of the building trades unions in some metropolitan areas to discourage by union contract the purchase and installation of equipment not manufactured by union labor had become so notorious that during the late 30's the Department of Justice began a series of antitrust actions against building trades unions and contractors. Nearly all these cases were discontinued after the Supreme Court in *United States* v. *Hutchinson*, 312 U. S. 219 (1941), held that the effect of the Norris-LaGuardia Act had been to immunize secondary boycott activity unless collusion with employers was shown.

In one case, a private action by a manufacturer against an electrical workers union which had a contract with the construction companies in the New York metropolitan area under which the contractors agreed not to install any equipment not made by the union, the Supreme Court held that there was such collusion, *Allen-Bradley* v. *Local Union No. 3, Brotherhood of Electrical Workers*, 325 U. S. 797 (1945).

In explaining the kind of activity at which Sec. 8(b)(4)(A) was particularly directed, the Senate committee in reporting out the bill containing this subsection referred specifically to this case in stating that its purpose was to define as an unfair labor practice the kind of conduct in which Local No. 3 had indulged,

viz., a product boycott, sanctioned by a hot cargo clause.[13]

The same Senate report also reveals the committee's concern with the fact that the Supreme Court had been unable to pronounce as a violation of the anti-trust laws, the operation of a contract between the Carpenters Union and a group of San Francisco contractors under which the employers agreed not to have the union membership install any mill work or prefabricated material made outside the Bay area. *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395. This case is expressly cited in that portion of the report explaining what was meant by the term "labor organizations and their agents". S. Rept. No. 105, 80th Cong., 1st Sess., p. 21, I Legis. Hist., 427.

Thus, the sponsors of the bill made it unmistakably clear that the very thing they proposed to outlaw included activity engaged in under the protection of a struck work or hot cargo clause. Moreover the hearings before both the House and Senate Committees are replete with testimony about secondary boycotts by unions in the trucking industry which were carried on at the expense of farmers, food processors and brewers, (see particularly, the testimony of M. J. Mulvihill for Western Pensylvania Brewers Association, Hse. Hearings, 256-347; H. L. Strobel for Associated Farmers, *id.*, 702-741; P. C. Turner for Food Producers Council,

[13] "This paragraph [*i.e.*, Sec. 8(b)(4)(A)] also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the IBEW whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3. (See testimony of R. S. Edwards, Vol. I, p. 176 *et seq.*, *Allen-Bradley Company* v. *Local Union No. 3, IBEW*, 325 U. S. 797)" S. Rept. No. 105, 80th Cong., 1st Sess., p. 22, I Legis. Hist., 428.

respecting produce markets in New York, Newark and Philadelphia, *id.*, 1840- 1849).

It is significant that some of these witnesses referred to contract clauses which gave the union either the right to make rules concerning the "physical movement of commodities received and delivered by the employer" (Hearings, 1845) or to "embargoes of hot milk" presumably authorized by contract (Hearings, 706). This testimony made a tremendous impression in the Senate where the language of Sec. 8(b)(4)(A) and (B) was drafted, as well as in the House. Senator Ball in offering an amendment to the Senate bill which would give private parties as well as the General Counsel authority to apply directly to the Federal District Courts for injunctions in secondary boycott cases, said that "in the Philadelphia, Baltimore and New York markets, the farmers hauling their produce are compelled to obey 100% every rule laid down by the Teamsters Union".[14] Although his amendment did not succeed, the relevant substantive language was incorporated into a substitute amendment, Section 303, where the unlawful action defined is identical with that in Section 8(b)(4).

As it is apparent from the Board's statement of the facts in *Conway's Express*, 87 NLRB 972, the first case in which it considered the problem, that hot cargo clauses were incorporated into Teamsters Union area contracts long before the Taft-Hartley Act was even thought of,[15] the attempt of the Senate to curb what

[14] Cong. Rec., May 9, 1947, 5038; Legis. Hist., 1351.

[15] Collective agreements with the Teamsters Union which are in the files of the American Trucking Association reveal that prior to the Taft-Hartley Act such clauses were not uncommon in area contracts for cartage companies and over-the-road carriers. See Appendix.

were viewed as high-handed tactics on the part of the Teamsters Union, must be looked upon as less than lialfhearted if the interpretation of the Act by the court below is correct. The hearings and debates as well as the committee report, however, make it obvious that the proponents of the Act never intended such a broad grant of immunity.

Another industry also mentioned in the Senate debates was the commercial printing industry, whose representatives had submitted a lengthy statement of their problems to the Senate Committee. Senate Hearings on S. 55 and S. J. Res. 22, pp. 2304-2319. This statement brings out that the "laws" of the principal printing trades union, the International Typographical Union, required every contract in the industry to incorporate by reference the General Laws of the Union (*Id.*, p. 2311). One of these laws was as follows:

> "Article III. Sec. 5. Subordinate unions at all times have the right to define as struck work composition executed wholly or in part by non-members, and composition on other work coming from or destined for printing concerns which have been declared by the Union to be unfair, after which union members may refuse to handle the work classified as struck work."

These excerpts from the legislative history of the Act demonstrate conclusively that Congress, far from approving of secondary boycotts permitted by contract, deliberately legislated to prohibit such practices.

B. Even the Unions Were Aware That the Act Did Not Countenance Hot Cargo Clauses

Until the surprising decision of the Board in *Conway* was handed down, unions themselves had no doubt that this was the Congressional objective. The Typograph-

ical Union, for example, denounced the Act as aiming at destroying three of its "historic prerogatives" *viz.*, struck work, closed shop and assertion of jurisdiction.[16] Accordingly, in an attempt to evade the Act it modified its standard struck work clause in an ingenious effort to disguise its real purpose.[17]

The contracts which the Board had occasion to review in *McAllister Transfer*, 110 NLRB 1769, and *Pittsburgh Plate Glass*, 105 NLRB 740, indicate that the strategists in the Teamsters Union recognized that the Taft-Hartley Act made it dangerous to insist upon their familiar hot cargo clauses. Instead of negotiating for such an obvious provision as a reservation giving the union the right not to have its members handle "unfair" goods, it was at first content with clauses which merely provided that individual employees would not be penalized for refusing to transport unfair goods.

The McAllister contract, as redrafted after the Board opinion in *Conway*, however, contained a notice to the carriers that in the event the old fashioned clause which had received the blessing of the Board in *Conway* "sustains or prevails on appeal to the higher Federal courts, this article will be renegotiated and rewritten to provide the union with the maximum protection afforded by such decision". 110 NLRB 1801.

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[16] *ITU (American Newspaper Publishers Ass'n.)*, 86 NLRB 951; *ITU, (Union Employers Section, Printing Industry of America, Inc.)*, 87 NLRB 1418, 1445, 1449.

[17] "The Employers' Section and its members will not undertake any activity which will in any sense undermine or jeopardize the Union's strength or security or the well being of its members. It is the intent of the Employers' Section and its members to limit composing room work to jobs *obtained on a normal* account basis." *ITU, etc.*, 87 NLRB, 1418 at p. 1477.

C. Congress Was Aware of Board and Judicial Precedent for Invalidating Contracts Contrary to Policies of the Act

Reference has already been made to the fact that the legislative history of Section 8(b)(4) reveals a Congressional intent to stop secondary boycotts, irrespective of contractual arrangements. Should the question then be asked as to why Congress omitted any specific language condemning hot cargo and struck work clauses, the answer is clear. A long line of Board decisions prior to the Taft-Hartley Act had shown Congress that the Board never gave effect to contracts which defeated the purpose of the statute, and even held attempts on the part of employers to get unions to agree to such contracts as unfair labor practices. These decisions were uniformly upheld in the Supreme Court. Illustrative of these cases is *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 323, 337, where the Supreme Court held that the Board properly refused to recognize as a defense to a refusal to bargain charge with respect to a particular group of employees, a number of individual contracts negotiated with these same employees before there was a collective bargaining representative. A similar holding was made in *National Licorice Company* v. *N. L. R. B.*, 309 U. S. 350.

In *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, the Court also held that an agreement on the part of a *majority* of the employees not to deal with their employer through a particular union was invalid as a defense to a refusal to bargain charge filed by this union, even though the consideration for the agreement which was proposed by a majority of the employees was a wage increase.[18]

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[18] Prior to the Taft-Hartley Act the Board was vigilant not only in setting aside contracts which it deemed contrary to the broad objectives of the Act, but also in holding employers who attempted

Since the Taft-Hartley Act has been passed the Board except with respect to hot cargo and struck work contracts has also uniformly taken the position that it will not only refuse to give effect to contracts which are expressly illegal, *e.g.*, contracts which contain closed shop or preferential hiring provisions, but even contracts which could be used to obtain results at variance with the Act. Thus, in the *Great Lakes Tankers* case[19] the Board pronounced as illegal those contracts requiring seamen to be hired through union hiring halls on the ground that the purpose was to discriminate against non-union seamen. Even where no discrimination has been shown in the operation of such contracts the Board has uniformly held that such contracts are no bar to an election petition by a rival union

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to effect or give effect to such agreements, guilty of unfair labor practices. *Bartell Mills Co.* v. *N. L. R. B.*, 111 F. (2d) 291, 292 (CA 4) (withdrawal of charge filed with NLRB);—see 18 NLRB 268, 279-280; *Stewart Die Casting Corp.* v. *N. L. R. B.*, 114 F. (2d) 849, cert. den. 312 U. S. 680 (recognition of majority union as representative only of employees who were union members); *McQuay-Norris Mfg. Co.* v. *N. L. R. B.*, 116 F. (2d) 748 (CA 7), modified on rehearing, 119 F. (2d) 1009, cert. den. 313 U. S. 565; *N. L. R. B.* v. *Louisville Refining Co.*, 102 F. (2d) 678 (CA 6) (negotiation with local, but not with national, union); *N. L. R. B.* v. *George Pilling & Co.*, 119 F. (2d) 32, 35 (CA 3) (organization by the union of the employer's competitors in the industry; see also 1 NLRB 349, 4 NLRB 596, 6 NLRB 1, and 37 NLRB 334); *Matter of Kellogg Switchboard & Supply Co.*, 29 NLRB 847 (termination of strike caused by employer's unfair labor practices); *Matter of Scripto Manufacturing Co.*, 36 NLRB 411, 426-428 (union incorporation or giving bond; additional bond cases to the same effect are 21 NLRB 1240, 1253, 20 NLRB 211, 228-229, 231-232; 74 NLRB No. 144); *Golden Turkey Mining Co.*, 34 NLRB 760 (withdrawal of charges).

[19] *National Maritime Union*, 78 NLRB 971.

or a minority group of employees, filed long before its expiration date.[20]

In the *ITU* cases,[21] where the Union attempted to circumvent the closed shop prohibitions in the statute by signing only contracts which could be cancelled on 60-days' notice, the Board properly denounced this conduct as a violation of Sections 8(b)(2) and 8(b)(3) on the ground that the union's purpose was to evade the impact of the interdiction of the closed shop by making its contracts of such short duration that it could cancel them should any non-union applicants for employment be hired.

Even in the instance of a union which waived its rights in order to secure other concessions in a collective bargaining agreement, the Board has held that such a waiver was invalid as it meant foregoing a right granted the union under the statutory scheme. See *Bethlehem Steel Co. (Sparrows Point Division)*, 89 NLRB 341, where the Board held that unions may not be asked to waive their right to be present at even the first step in the adjustment of grievances as provided in Section 9(a).

In view of this consistent line of precedents, uniformly upheld by the courts, it is difficult to understand why a majority of the Board have been hesitant to concur in Member Rodgers' consistent view (R. 67) that hot cargo contracts are also contrary to public policy. It is evident that such clauses not only nullify the purpose of Section 8(b)(4)(A), but in operation, as we

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[20] *American Export Lines*, 81 NLRB 1370; *Clayton & Lambert Mfg. Co.*, 83 NLRB 458; *Broadway Iron & Pipe Co.*, 83 NLRB 942; *Bedini Bros.*, 93 NLRB No. 82.

[21] 86 NLRB 951; 87 *id.* 1418.

noted in our preliminary statement, such contracts exert tremendous economic pressure upon employers to force their own employees into unions. Hence the existence of such contracts in large segments of industry brings duress upon employers to violate Section 8(a)(1) and 8(a)(3) of the Act.

There are judicial authorities which have recognized this. In a case which came before the Appellate Division of the New York Supreme Court the problem was the enforcement of an arbitration award giving effect to a contract clause under which the employer had promised to deal only with contracting firms employing members of the Union. The Court said:

> "The requirement that appellant [employer] shall send its cut fabrics for sewing only to contractors who employ exclusively members of the union is similar in nature and closely allied to the promise by appellant not to operate any 'non-union' factory itself. The object is to compel appellant to break its relations with its contractors who have been organized by [another union] unless they, in turn, break their collective bargaining agreements with [the other union], and discriminate without an election under the NLRA in regard to the hiring of their employees on the basis of union membership. The clear purpose is both to bring about the violation of existing contractual relationships and to exert economic pressure on contracting firms to violate the public policy of Section 8 of the National Labor Relations Act by coercing them to discharge their employees unless they change their union affiliation."[22]

[22] *Levinsohn Corp. v. Joint Board of Cloak, Suit, Skirt and Reefer Makers' Union*, 272 App. Div. 469, 22 LRRM 2153, reversed on other grounds, 299 N. Y. 254.

This aspect of the matter was pointed out also in a well reasoned opinion by Judge Denman, *Capital Service, Inc.* v. *N. L. R. B.*, 198 F. (2d) 20 (C. A. 9), declaring that irrespective of whether Section 8(b)(4)-(A) prohibits secondary boycotts invoked under a struck work clause, such activity has the effect of restraining and coercing the employees of the primary employer in violation of that section when the object of such activity is to secure recognition of a union which does not represent those employees. The Court said:

> "That the Board has sometimes, in enforcement cases, overlooked the possibilities of § 8(b)(4)(A) is suggested by what was said in Labor Board v. Rice Milling Co., 341 U. S. 665 at p. 672. The Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act.
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> "Nothing could more strongly restrain Service's employees from retaining their non-union status or coerce them into joining the Bakery Union than stopping or making intermittent their employment by picketing with appeals to persuade the public to boycott the products of their work. The evidence shows that all of the picketed stores did cease to sell the products manufactured by Service's employees. Here is more than an appeal to the *employees* to persuade *their* action. Here is successful economic coercion tending to prevent them from exercising their right to work, by diminishing the public consumption of the product of their work."

From this examination of the authorities, we submit that only two conclusions are possible—

(1) The doctrine that contracts repugnant to the policies of the Act cannot justify conduct which would

otherwise be an unfair labor practice was so firmly imbedded in Board and Court decisions by 1947 that Congress deemed it unnecessary to use specific language in order to indicate to the Board that it should apply the same principle to the new unfair labor practices as enumerated in Section 8(b).

(2) Contrary to what the majority of the court below has said, contracts permitting unions or employees of secondary employers to indulge in product boycotts are repugnant to the policies of the Act,[23] for such contracts defeat the broad objectives of Section 7, Section 8(b)(1)(A), Section 8(b)(2) and Sections 8(b)(4)-(A) and (B).

D. In Any Event, Persons, by Entering Into a Contract, May Not Deprive a Third Person of Statutory Rights

During the period when the Board's doctrine on hot cargo clauses was the same as that enunciated by the court below in the *Teamster* case (No. 273), Senator Taft expressed surprise that any administrative or judicial tribunal should think that a contract between two persons could affect the statutory rights conferred upon a third party by the Taft-Hartley Act.[24] Yet this

[23] Even where they have not been enforced the Board has frequently held (see cases cited *supra*) that the existence in collective bargaining contracts of illegal compulsory membership clauses has a coercive effect upon the employees and hence the execution of such an agreement is an unfair labor practice. If the same principle were applied to struck work clauses—and there seems to be no reason why it should not—the Board should also hold contracts illegal *per se*, for there can be no doubt that the existence of such a provision encourages union employees to refuse to handle non-union goods, even though the union itself does not instigate the work stoppage.

[24] Prior to the Board's repudiating the rule announced in the *Conway* and *Pittsburgh Plate Glass* cases, Mr. Miller of the Ameri-

novel notion is implicit in the proposition that what it is illegal for a union to do in bringing pressure on a struck employer becomes lawful if it has a contract with somebody else which authorizes it to engage in the proscribed conduct against the contracting party.

Judge Clark in the *Milk Drivers* case was apparently aware of this possible flaw in his opinion, for he condemns the Board's current approach to the hot cargo problem by stating that—

> "Having assumed that refraining from work described in a hot cargo clause is a 'secondary boycott', they frame the issue in terms of whether a hot cargo clause is a defense to a § 8(b)(4) unfair practice. We cannot agree with this characterization of the issue. There is no need for a 'defense' unless there has been a violation; and in determin-

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can Trucking Associations, criticized these decisions in testimony before the Senate Committee on Labor and Public Welfare, asserting that as a result, the Teamsters had obtained such "contractual privilege . . . that they may boycott with impunity." The following colloquy ensued:

> "SENATOR TAFT. We have had a lot of cases where the truckers were forcing employers to require their employees to be organized, or to join the trucking union, although they were warehouse employees or otherwise.
>
> "MR. MILLER. That is correct, Senator Taft.
>
> "SENATOR TAFT. The act attempted to stop that. Does it stop it?
>
> "MR. MILLER. No; because all that has been said is that they must get a union contract. And their contractual privilege is such that they may boycott with impunity.
>
> "SENATOR TAFT. Third parties who are not party to this contract?
>
> "MR. MILLER. That is right.
>
> "SENATOR TAFT. Of course, the whole purpose of the provision is to protect the third party. And he does not make any contract." [Hearings on Proposed Revisions of Labor-Management Relations Act, 83d Cong., 1st Sess., p. 739].

ing the latter question we look to the statutory language, rather than the vague concept 'secondary boycott' . . . .

The pleadings in this case show how completely this observation distorts the grounds on which the current Board majority doctrine was based. The record shows (R. 2-8) that the complaint against the Teamsters makes no use of the characterization "secondary-boycott". Instead, it merely alleges specific actions by the Teamsters Union and its agents in inducing and encouraging the employees of designated carriers to refuse to receive, check or haul, American Iron freight (R. 5), and further alleges (R. 7) that an object of this conduct was to force the carriers in question to cease doing business with American Iron.

In its answer the Union admitted the allegations of inducement and encouragement to *refuse* (R. 9), but pleaded affirmatively that the activities of the agents of the Union "have been directed to the sole purpose of complying with its contract governing the situation with the employers involved herein" (R. 9-10).[25] Consequently, the charge that it is the Board which has framed the issue of a hot cargo clause in terms of a defense is baseless. The issue is posed in those terms by the very party relying on the hot cargo clause.

This Court has recognized repeatedly that while contracts may be valid between the parties who make them, they may not be enforced in a way which would deprive third persons of constitutional or statutory protections against discrimination, *e.g.*, *Shelley* v. *Kraemer*, 334 U. S. 1 (holding that restrictive covenants based on

[25] Under Section 102.20 of the Board's Rules and Regulations, a respondent relying upon an affirmative defense must set it forth in his written answer.

race do not violate any constitutional rights but judicial enforcement thereof is contrary to the Fourteenth Amendment); *Conley* v. *Gibson*, — U. S. —, October Term 1957, No. 7, released November 18, 1957, (holding that a collective bargaining contract fair and impartial on its face may not be administered so as to discriminate against rights of Negro employees in bargaining unit); see also, *Hurd* v. *Hodge*, 334 U. S. 24.

The Second Circuit also attempted to buttress its reasoning by stating:

> "It will not do to say that encouraging work stoppages should be an unfair practice even in the absence of secondary employer coercion because the effect on the primary employer and the public at large is the same although the secondary employer consents. There is some difference to the public between an ordinary boycott of which it had no warning and which may be called for any purpose and a refusal to handle strike-bound goods under the terms of a hot cargo clause. The latter stoppage is less vexatious because it can be anticipated and is limited to the situations prescribed in the clause. But even without such distinctions in effect the Congressional language is clear and we should not expand the prohibitions of the Act merely because the language which eventually emerged from the legislative struggle produces some anomalies. See Rabouin v. N. L. R. B., supra, 2 Cir., 195 F. 2d 906, 912, 29 LRRM 2617."

The notion that stoppages due to hot cargo activity are less vexatious because they can be anticipated and presumably avoided, is wholly theoretical. Because of limited rail facilities many manufacturing enterprises are almost completely dependent upon motor carriers in the procurement of supplies and the delivery of their products. An outbreak of hot cargo activity which results in the indiscriminate piling up of commodities

at various terminals and transfer points because of difficulties in interlining shipments, is productive of tremendous confusion. Shippers, consignees and truck companies sometimes spend weeks in tracing shipments delayed at one point or another in the transportation field by the capricious interference of union agents.[26]

III. BUT IRRESPECTIVE OF THE QUESTIONABLE VALIDITY OF HOT CARGO CLAUSES IN GENERAL, COMMON CARRIERS HAVE NO RIGHT TO AGREE TO DISCRIMINATE AGAINST PRODUCTS OF ANY SHIPPER OR CONSIGNEE

As we have previously pointed out, the general theory of the Board members and Federal judges who have held that the application of hot cargo contracts does not violate Section 8(b)(4)(A), rests on the assumption that because employers are legally free to pick and choose the persons with whom they will do business, they have equal freedom to contract in advance against doing business with a particular class of persons.[27]

We have contended, of course, that this conclusion is not necessary or logical, as the contract violates the statutory rights of third parties.

But wholly apart from this issue we submit that in this case at least, this justification is not available. We are dealing here with a boycott accomplished by invoking the hot cargo clauses contained in contracts with common carriers. Unlike most private employers, common carriers are not free to pick and choose the

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[26] See report of I. C. C. examiner in *Galveston Truck Line Corporation* case, MC-C-1922, subsequently upheld, see fn. 28, *infra*.

[27] We refer to the majority opinion of the Board in *Conway's Express (supra)*, the minority opinions in *Sand Door* and this case, as well as the underlying reasoning of Judge Bastian in the court below, and Judge Clark in *Milk Driver's Local* v. *N. L. R. B.*, 245 F. 2d 817.

persons with whom they shall deal. Under state and Federal law a common carrier, unless prevented from doing so by flood, storms, violence or other forces beyond his control, has an obligation to accept and deliver all goods which are qualified for carriage without regard to the identity of the shipper or consignee.

The record shows that the carriers involved here held certificates from the Interstate Commerce Commission licensing them to haul freight by motor vehicle. Consequently, under the Interstate Commerce Act they had no right to engage in discrimination against such a shipper as American Iron.

As the Commission this very week has aptly stated:

> "We are here concerned, not with the legality of the hot cargo clauses as such, but with the actions of the defendant carriers in relation to their obligations under the Interstate Commerce Act to the public, without regard to the terms of any contract which they may have executed with a third party. Clearly, a common carrier may not bargain away its statutory obligations to the public and thereby relieve itself of such obligations . . .
>
> "We think it beyond doubt that the Interstate Commerce Act imposes upon common carriers by motor vehicle subject to our jurisdiction the clear and unmistakable duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding out to the public, and that they are obligated to accept and transport all freight offered to them in accordance with the provisions of their published tariffs. This duty is almost an absolute one; and, if the public is to be adequately protected, common carriers must be held strictly accountable for it performance . . .
>
> "We find no basis for the suggestion that the provision of the act and the duties and obligations

of common carriers thereunder are subordinate to requirements of labor unions . . . ."[28]

The foregoing holdings were made in connection with a complaint against some of the carriers in the instant case. It was predicated upon their failure to accept traffic from a connecting carrier which had been put on the union's unfair list. In the hearing on the complaint, the carriers, although claiming that the Oklahoma City Local Cartage Agreement (R. 187)—the language of which gave rise to the issue here—was imposed upon them by duress, nevertheless pleaded the hot cargo clauses in that contract as a defense to their refusal to interline freight with the complainant.

> "To approve the position of defendants would accord them and other carriers similarly situated immunity from violations of the Interstate Commerce Act, and substitute for the regulation of interstate common carriers now vested in this Commission an indirect control by labor organizations. For example defendants could sign a union contract, even under duress, providing that their union drivers could not be discharged or disciplined for failure to maintain drivers' logs as required by our safety regulations, and defendants would be excused from compliance with such regulations because to comply would subject them to threat of a strike . . . ." (Excerpt from I.C.C. decision, *supra*)

As the record in this case reveals no resort to threats or violence against any of the carrier employees, it becomes obvious that under the Interstate Commerce Act, these carriers were not free to decline to transport shipments from American Iron, as the minority of the Board and apparently a majority of the court below, assumed.

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[28] Decision of Interstate Commerce Commission in *Galveston Truck Line Corporation* v. *Ada Motor Lines, Inc., et al*, MC-C-1922 released mimeographed form on December 18, 1957.

It is true that neither the Board minority opinion nor the majority opinion of the court, were directed at anything except a construction of the Act administered by the Labor Board. Nevertheless, the obligations of a common carrier were called to their attention by a footnote in the dissenting opinion of Judge Prettyman.

This Court has held that in the enforcement of the Labor Relations Act, other Federal statutes should be taken into account. In *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, the Court was reviewing a decision of the Board holding that despite maritime legislation directed against mutinies, a strike aboard ship was concerted activity protected by Sections 7 and 8(a)(1) of the Labor Relations Act. The Court, in reversing an order of a court of appeals sustaining the Board, said (316 U. S. 31, at 47):

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-minded that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

We submit that this admonition destroys the basis of the Court of Appeals premise that the hot cargo contracts drawn into issue here were "lawful".

Since the opinion of that court was handed down, the Board in a 4 to 1 decision in which two of the members, Chairman Leedom and Jenkins who had hitherto not joined in the Rodgers' view that all hot cargo clauses were void as against public policy, held that because of the Interstate Commerce Act, such contracts were

certainly invalid so far as certificated common carriers were concerned. See *Truck Drivers Local Union No. 728 (Genuine Parts Co.)*, 119 NLRB No. 53. We commend the rationale of the majority opinion in that case and urge this Court, if it is reluctant to pass upon the broader issue of the validity of hot cargo clauses in general to hold that so far as the trucking industry is concerned, such contracts may not lawfully be entered into or enforced against common carriers.

CONCLUSION

We respectfully urge this Court to reverse the decision of the court below in Case No. 273, to affirm its decision in Case No. 324, and to remand the cases to that court with instructions to deny both petitions for review and to enforce the order of the National Labor Relations Board.

Respectfully submitted,

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December 21, 1957

APPENDIX A

The following is a partial compilation of "hot cargo" clauses in Teamster Union contracts with motor carriers when the Taft-Hartley Act became law:

"Central States" Agreement—Chicago, Ill.—Mich., Ohio, Ind., Ill., Wis., Minn., Iowa, Mo., N. D., S. D., Neb., and Kansas. *Changed*

> "It shall not be a violation of this contract if any employe or employes refuse to go through the picket line of a Union or refuse to handle 'unfair goods'. The Union agrees that in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement."

"Southwestern Area" Agreement—Oklahoma City, Oklahoma—3003—Ark., Okla., Texas, La. *Changed*

> "The Employer shall not request nor instruct any employe to go through the picket line of a Union nor to handle 'unfair goods', declared so by the Unions signed to this Agreement. However, the Union agrees that in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement."

"Southeastern Area" Agreement—Kingsport, Tenn.—Ala., Ga., Ky., Miss., Tenn., Fla. *Changed*

> "The Employer shall not request nor instruct any employe to go through the picket line of a Union nor to handle 'unfair goods', declared as such by the Unions signed to this Agreement. However, the Union agrees that in the event the Employer becomes involved in a controversy with any other Union, will do all in its power to help effect a fair settlement."

Birmingham, Alabama—2101—Local No. 612 *Now covered by Southeastern Agreement*

> Article 8.—No Violation of Picket Line
>
> "In case of a lockout or strike of any Union, it shall not be considered a violation of this Agree-

men9 for the members of the Local Union No. 612 to refuse to work or to handle, sign for, or haul such freight from such company, when such controversy is on, provided, however, that if any other means of transportation is being used where such controversy is on, then the members of Local Union No. 612 may be, at the discretion of the Union permitted to perform their usual duties for the Employer where such controversy is on, however, the Union agrees that in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement."

Now covered by Southeastern Agreement

Mobile, Alabama—4065—Local No. 991

Article 6.—[Same as Birmingham, supra]

Now covered by San Francisco Agreement

Stockton, California—Local No. 439

Section 3. "Employes reserve the right to reject any freight or merchandise assigned to or from a strike area, when men and equipment are in danger, nor shall they be required to pass picket lines recognized by the parent body of Local No. 439, or the parent body of the Union establishing the picket lines; it being understood, however, that the Union is not in favor of sympathetic strikes and will do everything within its power to avoid them."

Now covered by Southeastern Agreement

Atlanta, Georgia—Local No. 728

Article 8. "In case of a lockout or strike of any Union, it shall not be considered a violation of this agreement for the members of this Local Union No. 728 to refuse to work or to sign for, handle, or haul such freight from such company, where such controversy is on, provided, however, that if any other means of transportation is being used where such controversy is on, then the members of Local Union No. 728 may be, at the discretion of the Union, permitted to perform their usual duties for the Employer where such controversy is on. However, the Union agrees that in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement."

Detroit, Michigan—Local No. 299

Now covered by Central States Agreement

Article 5. Arbitration.—"It is expressly agreed that men covered by this Agreement will not be required to cross any bonafide picket line or do work on strikebound equipment."

Albany, New York—Local No. 294

Now covered by Western New York Agreement

Section 23. "A. The Union reserves the right to refuse to accept freight from, or to make pick-ups from or deliveries to establishments where picket lines, strikes, walkouts and lockouts exist.

"B. The Union agrees to notify the Employer of such refusal but agrees to deliver all freight received prior to giving of notification. However, this agreement to notify shall not apply to disputes involving the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America or any of its local unions."

Binghamton, Syracuse, Utica, Auburn, Elmira & Watertown, New York—Local No. 693

Western New York Agreement

Article IV. 20. "The Union reserves the right to stop any of its members at any time or under any circumstances from making any pickups, drops or deliveries at any place where labor trouble exists, and further reserves the right to allow any of its members to handle any merchandise involved in a labor dispute and under no circumstances will such merchandise be allowed to be taken from the terminal by any person for forwarding to its destination."

Charlotte, N. C.—2176, 3050, 1102—12-4-45 to 8-31-46 —Local No. 71

Now covered by Carolina Agreement

Section 7. (G): "The members of the Union shall have the right at all times to refuse to make pick-ups or deliveries at points where there is a strike authorized by this Local Union, the Joint Council of the District where one exists, or by the International Brotherhood. It shall not be considered a violation of this agreement for members of the Union to engage in sympathetic activities for and on behalf of Sister Local Unions."